NO. 43020-7 II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EMMETT MEADOWS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 11-1-01738-1

Response Brief

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Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the evidence sufficient to convict appellant of a violation of a court order as charged in count VII when it is established that defendant contacted D.G. twice on April 17, 2011?

2. Did the trial court properly order defendant to undergo a substance abuse evaluation and treatment as a condition of community custody when the conditions are crime-related and can be classified as affirmative conduct that is reasonably related to the safety of the community?

3. Should this Court remand for correction of defendant's sentence so that it complies with RCW 9.94A.701(9), and for clarification of a notation on the written judgment that is inconsistent with the court's oral ruling?

B. STATEMENT OF THE CASE.

1. Procedure

On April 25, 2011, the Pierce County Prosecuting Attorney's Office charged Emmett Meadows, defendant, with five counts of violation of a domestic violence court order. CP 1-4. The charges were amended twice so as to charge defendant with seven counts of domestic violence court order violation and one count of violation of a court order by

committing an assault, or in the alternative domestic violence court order violation. CP 5-11, CP 15-21.

On November 9, 2011, the jury trial was held before the Honorable John R. Hickman. RP 87. On November 17, 2011, the jury found defendant guilty of six counts of violation of a domestic violence court order, guilty of one count of violation of a court order, not guilty of one count of violation of a domestic violence court order, and unanimously answered yes to six special verdict forms establishing that Susan Landree and defendant were family or members of the same household. CP 114-129; RP 491-496.

On January 13, 2012, the court sentenced defendant to the statutory maximum of 60 months in custody and 12 months of community custody with conditions. CP 136-152; RP 518-522.

Defendant timely filed a notice of appeal on January 30, 2012. CP 153-170.

2. Facts

On January 26, 2011, Susan Landree obtained a permanent restraining order against defendant. RP 127, 329. After initially meeting in high school, Ms. Landree and defendant dated on and off for about 26 years. RP 125-126, 275, 305. Defendant was aware of the permanent restraining order against him and had been convicted twice before of protection order violations. RP 129, 307. Defendant lived at Ms. Landree's

residence with her three children since about 2009, until Ms. Landree obtained the protective order. RP 124-125, 305-306.

On April 2, 2011, Officer Joseph Laiuppa responded to a call about a protection order violation at Ms. Landree's home. RP 222. Ms. Landree testified that defendant was calling her cell phone and leaving threatening messages despite the protection order against him. RP 139. Officer Lauippa testified that Ms. Landree showed and played him five voice messages left by defendant and provided him with a written statement. RP 227.

On April 17, 2011, Officer Robert Latour responded to a domestic violence situation at Ms. Landree's home. RP 241. Ms. Landree testified that defendant came to her house, grabbed her neck, pushed her on the bed, and slapped her face. RP 151. She also testified that defendant threatened to, "slit her throat and watch the light go out of her eyes" if she reported the incident. RP 152. Officer Latour testified that he observed red spots on her neck and ear. RP 243.

Ms. Landree's son, D.G., testified that he heard defendant make this threat as he was only about six steps away in his room when it occurred. RP 153. D.G. testified that he heard defendant yelling insults at his mother and came out of his room to check on his mother and see if she needed a hug. RP 191. He also testified that defendant left when Ms. Landree called the police. RP 153. Officer Latour testified that on arrival,

he inspected Ms. Landree's home, witnessed her injuries, obtained her written statement, and spoke briefly to D.G. RP 241-251.

Officer Lauippa testified that he responded to another protection order violation call at Ms. Landree's home the next day. RP 227. He also testified that Ms. Landree reported that defendant called her from a blocked number, and provided him with a written statement. RP 227.

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT OF VIOLATION OF A COURT ORDER AS CHARGED IN COUNT VII WHEN IT IS ESTABLISHED THAT DEFENDANT CONTACTED D.G. TWICE ON APRIL 17, 2011.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. Thomas***, 166 Wn.2d 380, 390, 208 P.3d 1107 (2009). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational fact finder could have found the elements of the crime beyond a reasonable doubt. ***State v. Marohl***, 170 Wn.2d 691, 698, 246 P.3d 177 (2010).

Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from the evidence. ***State v. Gerber***, 28 Wn. App. 214, 217, 622 P.2d 888 (1981), ***State v. Theroff,*** 25

Wn. App. 590, 593, 608 P.2d 1254 (1980). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Both circumstantial and direct evidence are equally reliable. ***State v. Lubers,*** 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. ***Theroff***, *supra*, at 593. Credibility determinations are for the trier of fact and not subject to review. ***State v. Camarillo,*** 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, defendant claims that his conviction for the crime of violation of court order as charged in count VII should be reversed because the evidence was insufficient to prove that he and D.G. were family or household members. Brief of Appellant at 6. Defendant's claim fails on the merits as proving that he and D.G. were family or household members is not an element of the crime of violation of a court order.

To convict defendant of the crime violation of a court order as charged in count VII, each of the following five elements of the crime must be proven:

1. That on or about April 17, 2011, there existed a protection order applicable to the defendant,
2. That the defendant knew of the existence of this order;
3. That on or about said date, the defendant knowingly violated a

provision of this order as to D.G.;
4. That the defendant has twice been previously convicted for violating the provisions of a court order; and
5. That the defendant's act occurred in the State of Washington.

CP 98.

The record is sufficient to establish that the State met all of these elements. The first element is established by exhibit 1, the protection order obtained by Ms. Landree against defendant on January 26, 2011, as well as Ms. Landree's testimony that she got the order. RP 127-128. The protection order prohibits defendant from contact with Ms. Landree, her residence, and her children, which includes D.G. RP 128.

The second element is established by defendant's own testimony that he knew the protective order was in effect between March 30, 2011, and April 18, 2011. RP 129, 307.

The third element is established by Ms. Landree and D.G.'s testimony. Ms. Landree testified that defendant came to her house and assaulted her while D.G. was only about six steps away in his bedroom. RP 129, 289, 153. D.G. testified that on April 17, 2011, defendant was at Ms. Landree's home and spoke to D.G. RP 189. D.G. also testified that later that night he heard defendant yelling the following at his mother: "Just yelling at my mom, that she's good for nothing and a bunch of other stuff. Just him ranting on about what a bad person my mom is. I could hear his voice, and I know his voice like a mile away. I made sure she was

okay, if anything had happened or if she needed a hug at all." RP 190 - 191.

The fourth and fifth elements were established when the state admitted certified copies of defendant's two prior convictions that occurred in the state of Washington. RP 129-131.

In sum, the State clearly provided enough evidence to convict defendant of count VII violation of a court order. The state did not submit a special verdict on Count VII as it did on the other counts, asking the jury to determine whether the violation occurred between family or members of the same household. *See* CP 84-113, CP 115-129. Consequently, as Count VII is mislabeled on the Judgment and Sentence as a "domestic violence court order violation" instead of a "violation of a court order." The Judgment and Sentence should be corrected to have the domestic violence label stricken as to Count VII.

As the evidence is sufficient to convict defendant of count VII of violation of a court order, defendant's claim fails on the merits. As such, this Court should dismiss defendant's claim and affirm his conviction.

2. THE TRIAL COURT PROPERLY ORDERED DEFENDANT TO UNDERGO A SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CRIME-RELATED CONDITION WHICH IS REASONABLY RELATED TO THE SAFETY OF THE COMMUNITY.

When the trial court has statutory authority to impose a sentencing condition, this Court reviews sentencing conditions for abuse of

discretion. ***State v. Riley***, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The trial court abuses its discretion when the sentence it imposes is manifestly unreasonable, such that no reasonable person would adopt the view of the court. *Id.* No causal link need be established between the crime and the prohibition, so long as the condition relates to the circumstances of the crime. ***State v. Warren***, 134 Wn. App. 44, 70, 138 P.3d 1081 (2006).

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. . . .

> (3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:
>
> (a) Remain within, or outside of, a specified geographical boundary;
>
> (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (c) *Participate in crime-related treatment or counseling services;*
>
> (d) Participate in rehabilitative programs or otherwise *perform affirmative conduct reasonably related to* the circumstances of the offense, the offender's risk of reoffending, or the *safety of the community;*
>
> (e) Refrain from consuming alcohol; or
>
> (f) Comply with any crime-related prohibitions.

RCW 9.94A.703 (emphasis added).

a. The substance abuse evaluation and treatment are crime-related.

In this case, the trial court properly imposed the condition requiring defendant to undergo a substance abuse evaluation and follow-up treatment. CP 144. Defendant did not object either when the State recommended the condition at sentencing or when it was imposed by the court. RP 512-514, 519-520. The record demonstrates that defendant has substance abuse issues that clearly contributed to his protection order violations. Ms. Landree testified that she and defendant fought about drugs. RP 337.

It is established in the record that defendant had a drug problem. Ms. Landree testified that defendant had a problem with prescription pills and self-medication. RP 126. She also testified that on April 17, 2011, defendant was coming off of drugs when he came to her house and assaulted her while D.G. was in his bedroom. RP 150. She provided the following testimony, "Emmett ... would make all the promises that he was going to fix everything about him, get counseling, stop with all the drugs and the self-medicating of any prescription pills he could get his hands on..." RP 159.

It is apparent that the substance abuse evaluation and treatment is related to the crime because defendant was under the influence of drugs

when he committed the crimes of violating the protection order. Because the treatment is related to the overall manner in which defendant committed his crime, the trial court had proper authority to impose such a condition on defendant's community custody.

b. The substance abuse evaluation and treatment in this case can be classified as affirmative conduct that is reasonably related to the safety of the community.

In ***State v. Jones,*** 118 Wn. App. 199, 76 P.3d 258 (2003), the trial court required defendant to participate in alcohol counseling for his conviction of burglary. *Id.* at 203. On appeal, defendant argued that the counseling was unreasonable because it was not related to the crime. *Id.* at 207. The State argued that the counseling could be qualified as affirmative conduct that is reasonably related to the crime. *Id.* at 207–09. This Court, however, concluded that "alcohol counseling 'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense." *Id.* at 208. The court remanded the issue for resentencing with instructions to strike the condition pertaining to alcohol counseling. *Id.* at 212.

The facts in the present case are distinguishable from ***Jones***. First, as argued above, the record reflects evidence that substance abuse was indeed related to defendant's crimes. This includes defendant assaulting

Ms. Landree in the presence of D.G. while defendant was coming off of drugs.

The trial court properly required defendant to undergo a substance abuse evaluation and treatment because defendant has a substance abuse problem and was under the influence of drugs when he committed his crimes. These community custody conditions were necessary to reduce the potential risk to community safety. The trial court thus properly required defendant to undergo a substance abuse evaluation and treatment.

3. THIS COURT SHOULD REMAND FOR CORRECTION OF THE SENTENCE SO THAT IT COMPLIES WITH RCW 9.94A.701(9) AND FOR CLARIFICATION OF A NOTATION ON THE WRITTEN JUDGMENT THAT IS INCONSISTENT WITH THE COURT'S ORAL RULING.

a. Defendant's sentence should be remanded to comply with RCW 9.94A.701(9).

A sentence shall not exceed the statutory maximum when the term of confinement is added to the term of community custody. When added to the written order, the following language referred to as a "Brooks notation" was previously deemed effective to prevent a sentence from exceeding the statutory maximum: "the total term of confinement plus term of community custody actually served shall not exceed the statutory

maximum for each offense." ***In re Pers. Restraint of Brooks***, 166 Wn.2d 664, 211 P.3d 1023 (2009). However, following the enactment of RCW 9.94A.701(9), the court has held that the "Brooks notation" procedure no longer complied with statutory requirements. ***State v. Boyd,*** 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Under RCW 9.94A.701(9), first enacted in 2009, the community custody term specified by RCW 9.94A.701 "shall be reduced by the court whenever an offender's standard range term of community custody exceeds the statutory maximum or the crime." ***State v. Boyd,*** 174 Wn.2d at 472. Questions of statutory interpretation are questions of law subject to de novo review. ***State v. Franklin***, 172 Wn.2d 831, 835, 263 P.3d 585 (2011).

In ***State v. Boyd,*** defendant was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. ***State v. Boyd,*** 174 Wn.2d. at 322. Defendant was convicted of violating a protection order and was sentenced to terms of confinement and community custody that together exceeded the 60-month term statutory maximum for the offense. *Id.* The trial court included a notation on the judgment and sentence stating that the total term of confinement and community custody could not exceed the statutory maximum. *Id.* The Court held that following the enactment of the statute, the "Brooks notation" procedure no longer complied with statutory requirements. ***Boyd***, 275 P.3d at 322. The trial court was required to reduce Boyd's term of community custody to avoid

a sentence in excess of the statutory maximum. *Id.* Therefore, the remedy was to remand to the trial court to either amend the community custody term or resentence defendant on the protection order violation conviction consistent with RCW 9.94A.701(9). *Id.* at 323.

In ***State v. Franklin***, the Court held that the statute explicitly addressed the manner in which retroactivity operates for defendants who were sentenced before the amendments took effect, and the legislature charged the DOC, not sentencing court, with bringing preamendment sentences to compliance. *Id.* at 840.

The State concedes that the Brooks notation in the Judgment and Sentence no longer suffices after ***Boyd*** and the statutory amendment. As such, this Court should remand to the trial court to either amend the community custody term or resentence the defendant to a term consistent with RCW 9.94A.701(9).

b. Although the written order prohibiting contact with Ms. Landree and D.G. controls over the oral ruling, this Court should remand for clarification on the inconsistency between the written order and the oral ruling.

A written judgment is the final judgment in a case. *See generally,* ***State v. Davis,*** 125 Wn. App. 59, 64-65, 104 P.3d 11 (2004). Scrivener's errors are clerical errors that are the result of mistake or inadvertence, especially in writing or copying something on the record. They are not

errors of judicial reasoning or determination. *See* BLACK'S LAW DICTIONARY 582, 1375 (8th ed. 1999). Clerical mistakes, in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time of its own initiative. CrR 7.8(a), *see* ***State v. Davis,*** 160 Wn. App. 471, 478, 248 P.3d 121 (2011). Clerical mistakes may also be corrected before review is accepted by an appellate court, and once accepted for review by an appellate court may be corrected pursuant to RAP 7.2(e). *Id.* at 478. A clerical error is one that, when amended, would correctly convey the intention of the court based on other evidence. ***State v. Davis***, 160 Wn. App 471, 478, 248 P.3d 121 (2011).

Courts will apply the same test used to determine a clerical error under CR 60(a), civil rule governing amendment of judgments when determining whether a clerical error exists under CrR 7.8. ***State v. Snapp,*** 119 Wn. App 614, 627, 82 P.3d 252 (2004). In determining whether an error is clerical or judicial, the court will "look to whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." *Id.*, *citing* ***Presidential Estates Apartment Assocs. v. Barret***, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the judgment does embody the court's intention, then the amended judgment should either correct the language to reflect the court's intention or add the language the

court inadvertently omitted. ***Snapp***, 119 Wn. App at 627, *citing* ***Presidential***, 129 Wn.2d at 326. However, if the judgment does not, then the error is judicial and the court cannot amend the judgment and sentence. ***Snapp***, 119 Wn. App at 627, *citing* ***Presidential***, 129 Wn.2d at 326.

To the extent that an oral ruling conflicts with its written order, a written order controls over any apparent inconsistency with the court's earlier oral ruling. ***State v. Skuza***, 156 Wn. App. 886, 898, 235 P.3d 842 (2010).

Here, the court issued a written order prohibiting the defendant from contacting Ms. Landree and D.G. after orally ruling that it would not impose a no-contact order. CP 147, RP 513. When there is an inconsistency between the written order and oral ruling, the written order is controlling. ***State v. Skuza***, 156 Wn. App. at 898. As this case is being remanded for other corrections to the judgment, this inconsistency can be brought to the attention of the trial court and it can make a correction if one is needed.

D. CONCLUSION.

The evidence is sufficient to convict defendant of count VII of violation of a protection order because it is established that defendant contacted D.G. twice on April 17, 2011. Further, the trial court properly

imposed conditions requiring defendant to undergo substance abuse evaluation and treatment when it is established that drugs contributed to defendant's crimes, and the conditions can be classified as affirmative conduct that is reasonably related to the safety of the community. Therefore, this Court should dismiss defendant's claim and affirm his conviction. However, this Court should remand to the trial court so that defendant's sentence complies with RCW 9.94A.701(9), to strike the domestic violence label on Count VII, and for clarification on the no contact order.

DATED: November 27, 2012.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-27-12 Therese Kah
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